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ALEXANDER L
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No. 80-1972.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

MICHAEL CLEMENTE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

**Reply Brief in Support of
Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.**

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Table of Authorities Cited.

Cases.

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Statutes.

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8A Moore's Federal Practice — Criminal Rules, ¶ 30.04 (2d ed. June, 1981 Revision) 3n

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1. Contrary to the Government's contention (Br. Opp. 5),* this Court's recent decision in *United States* v. *Turkette*, 101 S.Ct. 2524 (1981), does *not* dispose of Point I of the petition for certiorari. While *Turkette* holds that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises, the case also holds that "enterprise"and "pattern of racketeering activity" are "separate elements" of an offense under 18 U.S.C. § 1962(c). 101 S.Ct. at 2528-29. Petitioner Clemente maintains that his conviction under § 1962(c) must be reversed because the trial judge did not adequately explain

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* "Br. Opp." denotes references to the Brief for the United States in Opposition to the petition for certiorari.

the separateness of these two elements to the jury. On the contrary, the judge's instructions affirmatively obliterated any distinction between the two elements and permitted the jury to find the defendants guilty of a § 1962(c) offense solely on the basis that they collectively committed a pattern of racketeering activity (see T. 12595-96)* and without a finding of participation in an enterprise "separate and apart from the pattern of activity in which it engages." 101 S.Ct. at 2528-29.

2. The decision in *Turkette* does not deal at all with the issues raised by Point II of the petition for certiorari — which attacks Clemente's conviction under 18 U.S.C. § 1962(d) for RICO *conspiracy*. On the contrary, given the definition of "enterprise" which it adopts, *Turkette* makes it all the more imperative for this Court to grant the petition because, as Point II demonstrates (Pet. 6-8), such a definition of "enterprise" creates intractable definitional problems in the concept of a § 1962(d) conspiracy to violate § 1962(c).

3. The Government *concedes* that

> a defendant must have agreed personally to commit or to aid and abet the commission of at least two predicate acts of racketeering in order to be convicted of a RICO conspiracy . . .. [Br. Opp. 7.]

The Government's claim that the trial judge's instructions adequately communicate this fact is without merit. Indeed, the very excerpts from the instructions which the Government quotes (Br. Opp. 7-8) demonstrate the validity of the points

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* Thus, the judge charged the jury

> In this case, the Government contends that the enterprise was a group of individuals associated in fact to control the waterfront in the New York area through a pattern of racketeering activity. [T. 12596.]

made in the petition (Pet. 8-10) And when these excerpts are read in the context of the entire instruction, Clemente's claim becomes all the stronger.**

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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** The Government argues that Clemente failed to object to the aspect of the RICO conspiracy instruction at issue, and thereby waived his right to challenge it now (Br. Opp. 7). Two points must be made in response. First, given the extremely unsettled nature of the law regarding RICO at the time of the trial, the failure to frame a specific objection to the aspect of the conspiracy instruction at issue should not be construed as a waiver, especially in light of the general objection that had been made to the underlying theory of the RICO counts. Second, even assuming that a failure to object could be construed as a waiver regarding an error in the instruction that was relatively insignificant, such a failure cannot be construed as a waiver regarding the type of error at issue here. It is well established that where, as here, the defect in the instructions is a fundamental one, going to the definition of the essential elements of the offense charged, the defect can and should be noticed on appeal as "plain error." 8A *Moore's Federal Practice — Criminal Rules*, ¶ 30.04 and cases cited at p. 30-16 n.8. (2d ed. June, 1981 Revision).